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UNITED STATES DISTRICT COURT

## DISTRICT OF ARIZONA

## In Re Bard IVC Filters Products Liability Litigation

No. MD-15-02641-PHX-DGC

DORIS JONES and ALFRED JONES, a married couple,

### **Plaintiffs.**

V.

C.R. BARD, INC., a New Jersey corporation and BARD PERIPHERAL VASCULAR, an Arizona corporation,

### Defendants.

**JONES PLAINTIFFS' SEPARATE  
STATEMENT OF FACTS IN SUPPORT  
OF THEIR MOTION FOR PARTIAL  
SUMMARY JUDGMENT ON  
DEFENDANTS' THIRTEENTH  
AFFIRMATIVE DEFENSE**

Plaintiffs, Doris Jones and Alfred Jones, submit this Separate Statement of Facts in Support of their Motion for Partial Summary Judgment on Defendants' Thirteenth Affirmative Defense. Plaintiffs contend that there is no genuine issue to be tried as to the following facts:

1. Defendant Bard Peripheral Vascular (“BPV”) sold a Bard Eclipse Inferior Vena Cava Filter to Memorial Health, University Medical Center in Savannah, Georgia which was implanted in Plaintiff Doris Jones on August 24, 2010. Bard Peripheral Vascular, Inc.’s and C.R. Bard, Inc.’s Supplemental Responses to Plaintiffs Doris and Alfred Jones’s First Set of Requests for Admission (“Def’s Supp. Resp. to RFA”) No. 4., pertinent pages attached hereto as Exhibits A and B.

1       2. Plaintiff Doris Jones was an appropriate candidate for implantation of the  
2 Eclipse IVC Filter which was appropriately indicated. Exs. A and B, Def's Supp. Resp. to  
3 RFAs No. 11 and 12.

4       3. Plaintiff Doris Jones met the indications for use or implantation of an  
5 Eclipse IVC Filter on August 24, 2010. Exs. A and B, Def's Supp. Resp. to RFA No. 13.

6       4. Anthony Avino, M.D., who implanted the Eclipse IVC Filter in Plaintiff,  
7 met the applicable standard of care in performing the implantation. Exs. A and B, Def's  
8 Supp. Resp. to RFA No. 14.

9       5. Anthony Avino, M.D. was not negligent in choosing to implant the Eclipse  
10 IVC Filter in Plaintiff Doris Jones. Exs. A and B, Def's Supp. Resp. to RFA No. 15.

11      6. Anthony Avino, M.D. did not cause any injuries alleged by Plaintiff Doris  
12 Jones in this lawsuit. Exs. A and B, Def's Supp. Resp. to RFA No. 20.

13      7. Anthony Avino, M.D. did not contribute to any injuries claimed by Plaintiff  
14 Doris Jones and was not a factor in producing any of her injuries. Exs. A and B, Def's  
15 Supp. Resp. to RFA Nos. 21 and 22.

16      8. On April 23, 2015, Doris Jones underwent retrieval of the Eclipse IVC Filter  
17 which was performed by Kirstin Nelson, M.D. Exs. A and B, Def's Supp. Resp. to RFA  
18 No. 24.

19      9. The decision by Kirstin Nelson, M.D. to remove the Eclipse IVC Filter was  
20 appropriate, as was her decision not to retrieve a filter fragment which traveled into  
21 Plaintiff's pulmonary artery. Exs. A and B, Def's Supp. Resp. to RFA Nos. 26 and 27.

22      10. Dr. Nelson did not cause, contribute to, and was not a factor in producing  
23 any injuries claimed by Plaintiff Doris Jones in this lawsuit. Exs. A and B, Def's Supp.  
24 Resp. to RFA Nos. 28, 29 and 30.

25      11. There is no evidence that Plaintiff Doris Jones's injuries were caused by  
26 abuse, misuse, abnormal use, or use of the Eclipse IVC Filter in a manner not intended by  
27 Defendants. Exs. A and B, Def's Supp. Resp. to RFA No. 32.

28

1       12. There is no evidence available to any party to this action of a change to  
2 condition of the subject Bard Eclipse IVC filter from the time it left the custody and/or  
3 control of Bard Peripheral Vascular and the time it was implanted in Plaintiff Doris Jones.  
4 See Declaration of Paul L. Stoller, attached hereto as Exhibit E.

5           13. As its thirteenth affirmative defense in the Master Answer in this lawsuit,  
6 Bard has asserted as follows:

7 Plaintiff's claims are barred to the extent that the injuries alleged in the Plaintiff's  
8 Complaint were caused by a substantial change in the product after leaving the possession, custody, and control of Defendants.

9 Defendants C.R. Bard, Inc. and Bard Peripheral Vascular, Inc.'s Answer and Affirmative  
10 Defenses and Demand for Trial by Jury, Doc. 366, at 29:6-8.

11        14. In response to Plaintiffs' request to admit that Plaintiff's injuries claimed in  
12 this lawsuit were not caused by a substantial change in the Eclipse IVC Filter after leaving  
13 the possession, custody, and control of Defendants but before implantation in Plaintiff,"  
14 Defendants responded

15 Based on the information currently known to Defendant, after reasonable  
16 inquiry, Defendant cannot admit or deny the Request because it has no  
17 knowledge, despite completion of all discovery in this case, about what  
happened to the Bard filter after it left the possession, custody, and control  
of Defendant but before implantation in Plaintiff.

<sup>18</sup> Exs. A and B, Def's Supp. Resp. to RFA No. 33 (emphasis added).

19       15. Plaintiffs requested that Defendants withdraw their thirteenth affirmative  
20 defense in the Jones case on August 22, 2017. See Aug. 22, 2017, letter from M.  
21 O'Connor to M. Lerner, attached hereto as Exhibit C.

22        16. In response, Defendants contended affirmative defense number 13 is “not an  
23 affirmative defense” in the Jones case and refused to withdraw it. *See* Aug. 23, 2017,  
24 letter from M. Lerner to R. Lopez and M. O’Connor, attached hereto as Exhibit D.

25 | RESPECTFULLY SUBMITTED this 28th day of August 2017.

## GALLAGHER & KENNEDY, P.A.

By: /s/ Paul L. Stoller

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## **CERTIFICATE OF SERVICE**

I hereby certify that on August 28, 2017, a true and correct copy of the foregoing was sent via U.S. Mail and/or Electronic Mail to:

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\*Counsel for Plaintiffs will be served in accordance with the Court's Case Management Order No. 1

/s/ Deborah Yanazzo